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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939.

PETER J. CARPENTER,
Petitioner,
vs.
WABASH RAILWAY COMPANY et al.,
Respondents.
No. 230.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF RESPONDENT, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS TRUSTEE, IN OPPOSITION THERETO.

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PRELIMINARY STATEMENT.

We are not satisfied with the statement of facts presented by the petitioner and are therefore submitting what we consider a more accurate and complete statement of the facts. Except where otherwise stated, all italics are ours.

for brevity, hereinafter referred to as "Appellant's Petition.")

I.

This Court inadvertently overlooked the allegation in "Appellant's Petition," and the point made and argued in his brief, that at, and ever since, the time appellant recovered his judgment against Wabash Railway Company, said company owned, and still owns, real estate in St. Louis, Missouri, having a reasonable value of more than $800,000.00 (R. 52). Appellant's said judgment was recovered in the Circuit Court of the City of St. Louis, Missouri, on February 13, 1931, and under the law of Missouri was and is a final judgment as of said date.

Under the provisions of Sections 1104 and 1105, Revised Statutes of Missouri 1929, said judgment was, and is, a lien on all of the real estate of Wabash Railway Company, situate in the City of St. Louis, Missouri, and such lien commenced on the day of the rendition of said judgment, and the Receivers thereafter took possession of, and hold, all such real estate subject to said lien.

While the Court's opinion treats of the questions relative to appellant's rights to priority over the liens of the mortgages, the Court has inadvertently overlooked a consideration of, and ruling upon, his said claim to a lien upon such real estate in the City of St. Louis.

Independent of what his rights may be, as against the liens of the mortgages, appellant's judgment lien on said real estate in St. Louis, Missouri, entitles him to a different status than that of general creditors having no lien (Appellant's Brief, pp. 23, 35-39).

II.

In its said opinion (pages 11-12) this Honorable Court, in substance, states that it is appellant's contention that,

under the law of Indiana, railway employees' claims for personal injuries are entitled to priority of payment as operating expenses, and that therefore the law of priority accorded to such claims by the law of Indiana should be made applicable "to all the properties of the Wabash, wherever situated."

While stating that Wabash Railway Company is an Indiana corporation, this Court, in its said opinion, inadvertently overlooked the allegation in "Appellant's Petition" that the company has railway lines and property in the State of Indiana reasonably worth many millions of dollars (R. 65-66). (See, also, Appellant's Brief, pp. 40-41.)

In such respect this Court has, in its said opinion, inadvertently overlooked the point made and argued in appellant's brief that:

> "Appellant's right to priority in the distribution of Wabash assets located in Indiana is in nowise affected by the fact that his injuries were not sustained in Indiana or that his judgment was recovered in the Missouri courts.
>
> "The said decision of the Supreme Court of Indiana states as a general proposition that personal injury claims against railroads are entitled to priority and payment as operating expenses. No limitation is made with reference to the state in which the injuries were sustained or a judgment recovered. In fact, the decision does not limit itself to judgments, but speaks and treats of all 'claims' for personal injuries" (Appellant's Brief, p. 43; see, also, Appellant's Brief, pp. 23-24, 40, 43).

This Court has inadvertently overlooked the proposition advanced in appellant's brief (pp. 40-41) to the effect that, while he submits for the consideration of the Court the suggestion that such priority should be made applicable as to all Wabash properties, wherever situate, since it is

an Indiana corporation, that, nevertheless, appellant does not "argue the same at length, **since Wabash does own properties in Indiana, out of which appellant's claim could be satisfied.**"

III.

This Court has inadvertently overlooked the decision of the United States Circuit Court of Appeals for the Fourth Circuit, in the case of Bowen v. Hockley et al., 71 Fed. (2d) 781, holding, among other things, that an employee's claim for personal injuries, sustained by him in the operation of his employer's business, is entitled to priority, and in equity and good conscience should be held a charge on the income of the business; and this Court has, in its opinion, overlooked the principle of equity announced in Bowen v. Hockley, supra, that:

> "The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that the claims of those who have helped to give it value as a going concern and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation" (Appellant's Brief, pp. 48-53).

IV.

Since the law of Indiana, as announced by its Supreme Court, is that a claim, such as appellant's, is entitled to priority and payment as an operating expense, and since

the Receivers have been and are in possession of, and operating, the properties of Wabash Railway Company in Indiana, this Court has inadvertently overlooked the principle announced by the United States Circuit Court of Appeals for the Fourth Circuit in Bowen v. Hockley, supra, that:

> "For the Court not to require its receiver to make the compensation payments which the state law requires of the owner of the business, would place it in the position of using its power to preserve the business for stockholders and creditors, without regard to the most helpless class of those having claims against the business itself. * * *" (Appellant's Brief, p. 52).

V.

In holding that a claim, such as appellant's, is entitled to priority by Subsection (N) of Section 77 of the Bankruptcy Act, as amended, but not in an equity receivership, this Court has inadvertently overlooked that the Congress of the United States has, by said statute, recognized the necessity of allowing preference to such claims, and of the payment of the same as operating expenses, and that the giving, in an equity receivership, to appellant's claim a status inferior to that so prescribed by said statute, is not in accord with the public policy of the United States, as so determined and announced by Congress.

As decided by the United States Court of Appeals for the Fourth Circuit in Bowen v. Hockley, supra, an employee's claim can be accorded priority and paid as operating expenses in an equity receivership, independent of the existence of a statute, and, therefore, this Court has inadvertently overlooked the contention made and argued by appellant that, under the principle that equity follows the law, appellant's claim should be accorded priority, and paid as an operating expense, as provided by said

Subsection (N) of Section 77 of the Bankruptcy Act (Appellant's Brief, pp. 49-52).

VI.

In holding the Special Master's report on appellant's claim was final and conclusive this Honorable Court has inadvertently overlooked the fact, as pleaded in "Appellant's Petition," and argued in his brief, that no order had ever been entered by the District Court approving or affirming said report (R. 62; Appellant's Brief, p. 62).

VII.

In holding the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the point made and argued by appellant that, as ruled by the United States Circuit Court of Appeals for the Sixth Circuit in Holman v. Cross, 75 Fed. (2d) 909-913, a Special Master's erroneous conclusions of law are not final or binding on the Court, or the aggrieved party, notwithstanding the absence of any exceptions thereto (Appellant's Brief, p. 62).

VIII.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked that, while the order appointing the Special Master provided that the various matters, therein mentioned, were referred to him for his investigation, determination and report, nevertheless, the **order as to the filing of claims which was thereafter made** merely provided that he was authorized "to investigate, hear proof and **report**" on claims filed, and that, therefore, appellant's

claim was referred to the Special Master merely for a **report** which was merely **advisory**, and that it was the **duty** of the **District Court** to **decide** appellant's claim (Appellant's Brief, pp. 26-28, 64).

IX.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the rule, as stated by the United States Circuit Court of Appeals for the Fifth Circuit in Lone Star Gas Company v. City of Ft. Worth, 93 Fed. (2d) 584-585, and argued in appellant's brief, that a Special Master's report is merely advisory (Appellant's Brief, p. 64).

X.

In holding that the Special Master's report on appellant's claim was final and conclusive, this Court has inadvertently overlooked the fact, as pleaded in "Appellant's Petition," and argued in his brief, that the order for the filing of claims made no provision as to the **contents** of the proof of claims, and, as to such respect, made no requirement other than "that all persons having any such * * * claims shall file their claims," etc. (R. 24; see also Appellant's Brief, p. 56).

Appellant's claim set forth his judgment, and this Honorable Court has inadvertently overlooked the point made and argued by appellant to the effect that his priority and lien were dependent upon, and arise out of, law and equity, and, therefore, the various laws and rules and principles of equity, under which he claims a lien and priority, and the right to payment of his claim as an operating expense, are matters within the judicial notice of courts and not required to be either pleaded or proven (Appellant's Brief, pp. 56-64).

XI.

In holding the Special Master's report on appellant's claim is final and conclusive, this Court has inadvertently overlooked the point made and argued in appellant's brief that, in the matter of filing and determining claims in an equity receivership proceeding, there is no occasion to deny a claimant the right to be heard in opposition to a Special Master's report during such time as the receivership is pending and before any distribution to creditors has been made (Appellant's Brief, p. 59).

XII.

This Court, in its said opinion, inadvertently overlooked making any ruling upon the point, made and argued in appellant's brief, that the receivers of Wabash Railway Company are unfit and are not disinterested persons, and should be removed from office.

The opinion states that "the present receivers are alleged to be former executives of the Pennsylvania Railroad, or one of its subsidiaries; * * *."

This Court has inadvertently overlooked the fact and contention, alleged in "Appellant's Petition" and in his brief, that the original receivers, Frank C. Nicodemus, Jr., and Walter S. Franklin, were assistant general counsel and president, respectively, of Wabash Railway Company, and at the time of, and for some years prior to, the commencement of the receivership were maintained as such officers by Pennsylvania Railway Company, through its control of Wabash, and that Norman B. Pitcairn, who was named a receiver when said Walter S. Franklin resigned as Receiver to become an officer of Pennsylvania Railroad, was, for some years, a major executive or representative of Pennsylvania Railroad (R. 53; Appellant's Brief, 72-78).

XIII.

This Court inadvertently overlooked the point, made and argued in appellant's brief, that the receivership should be terminated because the frauds committed against Wabash Railway Company made necessary, for the protection of the company and its creditors, that any reorganization of the company should be under the provisions of Section 77 of the Bankruptcy Act, so that there would be available the highly remedial measures provided by Congress in said section 77 (Appellant's Brief, pp. 72-78).

XIV.

The Court inadvertently overlooked point X in appellant's brief that appellant, as a judgment and lien creditor of the Wabash, had an absolute right to move the termination of the receivership, the discharge of the Receivers and the dissolution of such injunction (Appellant's Brief, pp. 79-81).

XV.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that Equity Rule No. 37 is no longer in effect and that this Court must give effect to Rule No. 24 of the New Federal Rules of Civil Procedure (Appellant's Brief, pp. 81-83).

XVI.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that the orders, rulings and judgments here appealed from are violative of the Fifth Amendment to the Constitution of the United States (Appellant's Brief, p. 83).

XVII.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that the enactment of Section 77 of the National Bankruptcy Act, providing for the reorganization of interstate railroads, has made unnecessary and undesirable a continuation of the receivership (Appellant's Brief, pp. 66-78).

XVIII.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that appellant should have been permitted to file his petition because, as an interested party, he was entitled to move the discharge of the Receivers and present the question upon the situation existing at the time his petition was filed. In re Metropolitan Railway Company, 208 U. S. 90-112; 53 C. J. 87 (Appellant's Brief, pp. 80-81).

XIX.

The Court inadvertently overlooked the point, made and argued in appellant's brief, that any application made, at any time, to modify an existing injunctional order should be heard, and if the facts warrant it such order should be modified (Appellant's Brief, p. 81).

XX.

The Court inadvertently overlooked the fact that the frauds committed upon Wabash, as in "Appellant's Petition" set forth, have been investigated and denounced by members of a committee appointed by the United States Senate (Appellant's Brief, p. 5; R. 53-54).

We respectfully submit that for the foregoing reasons this petition for a rehearing should be granted.

ROBERTS P. ELAM,
MARK D. EAGLETON,
HYMAN G. STEIN,
Attorneys for Appellant.

The undersigned, solicitors for appellant Peter J. Carpenter, hereby certify that the foregoing petition for rehearing is not interposed for delay, but is presented and filed in good faith, and believed to be meritorious.

Roberts P. Elam,

Mark D. Eagleton,

Hyman G. Stein,
Solicitors for Appellant Peter J. Carpenter.

(Endorsed): Filed in U. S. Circuit Court of Appeals, May 27, 1939.

[fol. 137] (Order Denying Petition for Rehearing.)

May Term, 1939.

Monday, June 12, 1939.

The petition for rehearing filed by counsel for the appellant having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

June 12, 1939.

(Motion of Appellant for Stay of Issuance of Mandate.)

Comes now the Appellant in the above entitled cause and moves the Court to stay the Mandate in the above entitled cause, and as grounds for said Motion states:

1. Appellant intends to file an application in the Supreme Court of the United States for its writ of certiorari, directed to this Court, to issue in this cause, and counsel for Appellant are now engaged in the preparation of same.

2. No prejudice, under the particular circumstances of this case, can result to Appellees from a staying of this Court's Mandate pending Appellant's said application.

MARK D. EAGLETON,
ROBERTS P. ELAM and
HYMAN G. STEIN,
By Hyman G. Stein,
Attorneys for Appellant.

Hyman G. Stein, being one of the attorneys for the above named Appellant, Peter J. Carpenter, hereby certifies that [fol. 138] the foregoing Motion to Stay Issuance of Mandate is not filed for delay, but is presented and filed in good faith.

HYMAN G. STEIN,
Of Counsel for Appellant.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 22, 1939.

(Order Staying Issuance of Mandate.)

May Term, 1939.

Tuesday, June 27, 1939.

On Consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, It is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

June 27, 1939.

[fol. 139] (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Eastern District of Missouri as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Peter J. Carpenter was Appellant and the Wabash Railway Company, et al., were Appellees, No. 11354, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eleventh day of July, A. D. 1939.

(Seal)

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, limited to the question of the right of the petitioner to intervene in order to assert priority.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

STATEMENT OF THE CASE.

The petitioner, Peter J. Carpenter, on February 13, 1931, in Division No. 14 of the Circuit Court of the City of St. Louis, recovered a judgment against the respondent, Wabash Railway Company, on account of personal injuries sustained by him while in its employ, in the amount of $15,000.00 and costs (R. 33, 78, 105, 106-107).

Thereafter, on December 1, 1931, the T. J. Moss Tie Company, a Missouri corporation, filed its bill of complaint against the said Wabash Railway Company in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, in Equity No. 9704, in which complaint it alleged that it was a general unsecured creditor of Wabash Railway Company; that said Railway Company was insolvent, that its railway lines and other properties were heavily mortgaged and that it was unable to pay its debts; and prayed for appointment of receivers of all the railway lines and properties of said Railway Company (R. 2-14, 79). The Railway Company filed its answer to said bill of complaint, in which it admitted the allegations in said bill and consented to the appointment of receivers (R. 14-16, 79). Thereupon, on said December 1, 1931, an order was entered in said cause appointing Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of all the lines of railway and other properties of the Wabash Railway Company (R. 16-17, 79). Said order, among other things, provided that "all other persons, firms and corporations whatsoever and wheresoever situated, located or domiciled, be, and they are hereby, restrained and enjoined from interfering with, attaching, levying upon or in any manner whatsoever disturbing any portion of the property and premises of which Receivers are hereby appointed, or from taking possession of, or in any way interfering with, the same or any parts thereof, or from inter-

fering in any manner to prevent the discharge by said Receivers of their duties or the operation of said property and premises under the orders of this Court" (R. 20, 79-80).

Thereafter, on December 4, 1931, Wabash Railway Company, defendant, in Division No. 14 of the Circuit Court of the City of St. Louis, Missouri, took an appeal from the judgment in favor of Peter J. Carpenter, the petitioner herein, to the Supreme Court of the State of Missouri (R. 107).

On March 19, 1932, the District Court appointed Forrest C. Donnell Special Master, in Cause No. 9704, In Equity, invested him with the customary powers of a Special Master under the Federal Equity Rules, and "referred to him for his investigation, determination and report" all claims filed in said cause "by which the claimant, interpleader, intervenor or other pleader seeks to recover any money or property from the Receivers appointed in this cause out of the estate in their hands." *The order appointing the Special Master made no provision for the filing of exceptions to claims, the validity of which were uncontested,* but provided that the Special Master should, before finally settling his report in any contested case, furnish to parties in interest a copy of his proposed report, and that any of said parties desiring to except to all or any part of such report should file with the Special Master their exceptions thereto, and the Special Master would thereupon notify the parties of the date upon which he would hear said exceptions and finally settle his report (R. 22-23, 80).

On April 7, 1932, the District Court ordered that all persons claiming to be creditors, secured and unsecured, and having accounts, debts or claims against Wabash Railway Company should file their claims on account thereof with the Special Master, on or before July 1, 1932, and directed

the Special Master to investigate, hear proof and report on all claims by persons claiming to be creditors, both as to correctness and validity of all such accounts, debts and claims, and also as to the lien and priority, if any, thereof, after claimants had been given an opportunity to present and make proof, before said Special Master, of the amounts of their respective claims and the lien and priority, if any, thereof (R. 23-25).

The statement of claim of Peter J. Carpenter, the petitioner herein, against Wabash Railway Company, respondent herein, was verified by him on June 9, 1932. It recited that said claim was based on a judgment recovered by him against said Railway in the amount of $15,000.00, together with interest thereon at the rate of 6 per cent per annum, from the 14th day of February, 1931, the date of the rendition and entry of said judgment in cause No. 142,433, of the Circuit Court of the City of St. Louis, Division No. 14, and that said judgment was pending on appeal in the Supreme Court of the State of Missouri (R. 106-107), which, on June 2, 1934, entered a new judgment in favor of petitioner in the sum of $10,000 with interest and costs. *Said claim*, which was filed with the Special Master on or prior to July 1, 1932 (R. 102), *contained no prayers or assertion of right to any priority or preference in payment*. However, the Receivers for the respondent Wabash Railway Company on filing their answer to the above claim August 31, 1932, while admitting the judgment was rendered against said railway as alleged, expressly denied that said claim was entitled to any preference or priority in payment (R. 102, 109).

Thereafter, on October 8, 1933, Walter S. Franklin, upon having been elected a vice-president of the Pennsylvania Railroad, tendered to the District Court his resignation as one of the Receivers of the Wabash Railway Company

(R. 32), which was accepted (R. 33), and said Court appointed, as his successor, one Norman B. Pitcairn (R. 34).

Thereafter a hearing was had on petitioner's claim before the Special Master on August 26, 1935, at which hearing counsel for petitioner appeared and offered only a certified copy of the judgment of the Circuit Court of the City of St. Louis, but made no claim to any preference or priority in payment (R. 102-104). Thereafter, on January 6, 1936, and in the presence and hearing of counsel for petitioner (R. 104-105) the Special Master made the following statement:

> "On this 6th day of January, 1936, there being present Roberts P. Elam, attorney for claimant, the Special Master determined that, pursuant to bill of costs, being attached and marked 'Exhibit B,' hitherto presented to the Special Master by counsel for claimant in the above matter, the court costs hereinbefore referred to are hereby determined to be the sum of $104.15, wherefore, the Special Master determined that he shall report to the Court:
>
> "(a) That said claim, to the extent of $10,000.00 principal, plus $104.15, court costs, plus interest on said principal amount of $10,000.00, at the rate of 6 per cent per annum from February 13, 1931, to December 1, 1931, is correct and valid, and should be allowed in the aggregate of the said principal sum, court costs and interest, as a general unsecured claim, and that judgment should be entered thereon in the above-entitled cause in favor of said claimant Peter J. Carpenter, and against Defendant Wabash Railway Company in said aggregate amount;
>
> "(b) *That said claim is not entitled to any lien or to any priority over other general unsecured claims.*"

The record shows no objection or exception on the part of claimant's counsel to this determination. Thereafter, on March 7, 1936 (R. 34), pursuant to such findings, the

Special Master filed his report, together with a transcript of the proceedings before him, in which report he recommended that petitioner's claim be allowed as a general unsecured claim without any preference or priority over other unsecured creditors.

The record shows no exceptions to the Special Master's report filed within twenty days of the time of filing of said report as required by Equity Rule 66, and shows no exceptions to such report filed at any time.

On March 1, 1937, and November 1, 1937, respectively, the trustees, under two mortgages, filed their respective bills of complaint against Wabash Railway Company for mortgage foreclosures and other judgments incident thereto. Both of these proceedings were consolidated with the original receivership proceeding against the Wabash Railway Company; the Receivers appointed in said original cause were continued as Receivers in said consolidated cause, and said consolidated cause was, and is, being carried on in said District Court as consolidated cause in equity, No. 12,099 (R. 37-44, 66-67, 80-81, 114-115).

Such being the state of the record, the petitioner, on January 26, 1938, filed his application for leave to file his intervening petition, styled "Application of Peter J. Carpenter for Leave to File His Petition for Order Terminating Receivership of Wabash Railway Company and Dissolving Temporary Restraining Order and Injunction" (R. 47). Said petition alleged, among other things, that petitioner sustained personal injuries while engaged in the performance of his duties as an employee of Wabash Railway Company, and on that account is a judgment creditor of said Railway Company in the sum of $10,000.00, with interest and costs; and that as owner of said judgment he, on October 29, 1931, under the applicable laws of Missouri, had and still has a lien on all

real property in the City of St. Louis, Missouri, owned by said Railway on and since October 29, 1931 (R. 51-52), and that at the time petitioner recovered said judgment said Railway Company was and still is the owner of real property in the City of St. Louis, Missouri, of the reasonable value of more than $800,000, and that said judgment remains unpaid.

Said petition further alleged that Kuhn, Loeb & Company, an investment banking corporation, is, and for many years has been, the banker for the Pennsylvania Railroad Company; that it also had and exercised control of the Wabash and its financial policies and investments in 1926; that the Pennsylvania Railroad Company conspired and connived with Kuhn, Loeb & Company in a course of conduct whereby the Wabash was caused to, and did, purchase and acquire Lehigh Valley Railroad Company stock; that such stock purchases were made without the knowledge or approval of the Interstate Commerce Commission, and were concealed from the Interstate Commerce Commission by the making of false reports and by the falsification of the books and records of the Wabash; that Kuhn, Loeb & Company collected and received fees, commissions and profits in excess of $1,000,000, and sold to the Wabash Company, at great profit to itself, stocks owned by Kuhn, Loeb & Company; that the foregoing was accomplished by a conspiracy between Kuhn, Loeb & Company and officers and directors of the Wabash, thus alleged to be controlled by Kuhn, Loeb & Company and the Pennsylvania Railroad Company; that the losses accruing to the Wabash Railway Company by said transactions were in excess of $20,000,000; that, although such transactions, course of conduct, and the losses sustained by the Wabash Company, as the result thereof, had, through a congressional investigation, been made generally known to the public, the Wabash Receivers had taken no action to re-

cover moneys lost by the Wabash thereby; that by reason of their failure to take any such action, and because of their aforesaid relationship with the Pennsylvania Railroad Company, the said Receivers are improper persons to act as Receivers of the Wabash, and that their continuance in office as said Receivers is in conflict with the spirit and provisions of Section 77 of the Bankruptcy Act, enacted by Congress as a means of curbing abuses of friendly railroad receiverships and requiring the appointment of a disinterested trustee; that the Pennsylvania has so improperly exercised its control of Wabash as to cause Wabash to suffer great losses and wasting of its assets; that the same interests which caused Wabash to sustain said losses through the mentioned transactions and course of conduct, and "which interests include Kuhn, Loeb & Company, the Pennsylvania Railroad Company, their nominees, and persons under their control," are still in control of matters pertaining to securities of Wabash Railway Company, and have obtained and possessed, and are undertaking to exercise, such powers as will permit them to direct the course of, and policies relating to, any reorganization of Wabash Railway Company; and that "it is only by such remedial legislation, and supervision and exercise of powers of the Interstate Commerce Commission, as are provided for in Section 77 of the National Bankruptcy Act, that a proper accounting on behalf of Wabash Railway and the protection of the creditors of Wabash Railway Company can be had"; that under the circumstances existing the receivership should be terminated, so that thereby there might result the institution of a proceeding for the reorganization of the Wabash, under the provisions of said Section 77 of the Bankruptcy Act; that since the commencement of the receivership there have been practically no proceedings of a constructive nature looking to a final disposition of the action and the ter-

mination of the receivership; that the receivership has become a "nursing" receivership; *that the claim of petitioner is one entitled to priority over the liens of the mortgages and is entitled to present payment as an operating expense;* and prays for an order dismissing and terminating the several receivership proceedings and for its dissolution as to him of the injunctive orders contained in the orders of the Court appointing Receivers (R. 51-77).

The petition of petitioner, Peter J. Carpenter, for leave to file his intervening petition was heard and submitted on August 31, 1938. The Court thereupon entered certain findings of fact (R. 78-83) and an order denying said petition for the following reasons:

"(a) The petition which said petitioner seeks leave to file does not conform to the requirements of Equity Rule No. 37;

(b) The status and classification of petitioner's claim as an unsecured claim which is not entitled to any lien or priority of payment over any other unsecured claim has heretofore been correctly and finally determined in this cause, and said petitioner is now estopped from asserting a claim for preference and priority of payment over the many other unsecured creditors whose claims have been filed and allowed in these proceedings;

(c) The intervening petition which petitioner seeks leave to file states no cause of action in equity, and the granting of leave to file will merely serve to encumber and delay the orderly process of these cases toward a reorganization of the properties of the defendant Railway Company;

(d) The dismissal, as to said petitioner, of the injunctive provisions of the several orders of this Court appointing the receivers in the several constituent causes of this consolidated cause, without a dismissal of the said several causes, would be of no aid or benefit to said petitioner, since all of the properties of the

> defendant Railway Company would remain in the exclusive custody and control of the Court's receivers."

Thereupon, petitioner duly took an appeal to the United States Circuit Court of Appeals for the Eighth Circuit (R. 77-78, 84-99). On May 13, 1939, after due submission, the United States Circuit Court of Appeals for the Eighth Circuit, by Van Valkenburgh, Circuit Judge, rendered its opinion (103 F. [2d] 996-1001; R. 113-123) and decree (R. 123-124) upon petitioner's said appeal, affirming the said judgment and decision of the said District Court, and in its opinion holding:

> 1. That "(a) the statutes and decisions of the State of Missouri did not operate to give priority to the petitioner's claim; that (b) the decisions of the Eighth Circuit Court of Appeals have been consistently against this contention; that (c) the statutes and decisions, or judgment of Indiana and Ohio, assuming petitioner correctly states them, have no extraterritorial effect; and that (d) Subsection (n) of Section 77 of the Bankruptcy Act, as amended, did not apply to equity receiverships (103 F. [2d] 996, l. c. 1000; R. 119-120).
>
> 2. "But apart from whether judgments of this nature normally have, or may have, priority rights over antecedent mortgage liens, we believe appellant is foreclosed by this record from asserting such rights in this action. The court in its conclusions of law found that the status and classification of petitioner's claim had been correctly and finally determined as an unsecured claim, and that the petitioner was estopped from asserting its preference and priority of payment. We think the record fully justifies this finding and conclusion" (103 F. [2d] 996, l. c. 1000; R. 120-121).

thus holding that the trial court rightly held petitioner herein, after the findings of the Special Master were for two years accepted as final and conclusive, estopped from asserting a claim for preference and priority of payment

over the many other unsecured creditors whose claims have been filed and allowed (103 F. [2d] 996, l. c. 1000-1001; R. 121).

3. That it inclined to agree with the trial court that the petition sought to be filed did not conform to the requirements of Equity Rule No. 37, then in force (103 F. [2d] 996, l. c. 1001; R. 122).

4. That (a) the petitioner whose claim has already been filed and its status determined, has no absolute right to file and be heard upon his proposed petition (103 F. [2d] 996, l. c. 1001; R. 121-122); and that (b) denial of the application of petitioner, whose claim had been allowed, to intervene and file a petition for dismissal of injunctive orders was not abuse of the trial court's discretion, since the trial court should consider whether intervention will unduly delay or prejudice adjudication of rights of original parties, and since dismissal of receivers and dismissal of injunctive orders would not aid the judgment creditor without dismissal of the several causes (103 F. [2d] 1001; R. 122-123).

Thereafter, on May 27, 1939, petitioner duly filed his petition for a rehearing in said cause in the Circuit Court of Appeals (R. 125-135). Said petition for rehearing was denied on the 12th day of June, 1939 (R. 137), whereupon, upon motion duly made and filed June 22, 1939 (R. 139), the Circuit Court of Appeals on June 27, 1939, made its order staying the mandate pending a petition to this Court for a writ of certiorari (R. 138).

QUESTIONS PRESENTED.

In his petition for writ of certiorari the petitioner has set out seven distinct questions (pages 2 and 3 of Petition for Writ of Certiorari and Brief in Support Thereof). It is the respondent's position that the questions presented are correctly stated by the Circuit Court of Appeals in its opinion where it stated (103 F. [2d] 996, l. c. 999; R. 119):

> "The decree of the court, being upon the application of appellant for leave to file his proposed petition, our determination must in effect be limited to a consideration of two questions: (a) is the claim of appellant entitled to priority over the liens of the mortgages in suit and to payment as such; and (b) has appellant the absolute right to file and be heard upon a petition praying, as relief, the preservation and enforcement of his alleged prior lien, the termination of the receivership, and dissolution of the injunctive orders incidental thereto?"

SUMMARY OF ARGUMENT.

I.

A.

The matters at issue in the within cause were correctly decided by the Circuit Court of Appeals for the Eighth Circuit when it affirmed the order of the District Court denying, on the ground of estoppel, the petition of Peter J. Carpenter, petitioner herein, for leave to file his petition for order terminating receivership of respondent Wabash Railway Company; and dissolving temporary restraining order and injunction.

B.

Petitioner was not entitled to file his intervening petition because it did not comply with Equity Rule 37, governing intervening petitions, and was not in compliance with Rule 24 of the New Federal Rules.

II.

A.

The decision of the Circuit Court of Appeals, in holding the petitioner estopped from not asserting a claim for preference, is not in conflict with the decisions of any other circuit, nor is the Court's decision denying to petitioner leave to file his intervening petition and the relief prayed therein in conflict with any decisions of this Court.

B.

There is no conflict between Bowen v. Hockley, 71 F. (2d) 781 (C. C. A. 4, 1934), and Carpenter v. Wabash Railway Company, 103 F. (2d) 996 (C. C. A. 8, 1939).

III.

A.

Section 77 of the Bankruptcy Act, as amended, had and can have no application to petitioner's claim for preference or priority in payment because his rights and the rights of other creditors were fixed as of the date when the receivers were appointed.

B.

Petitioner's claim when receivers were appointed, when filed, when heard by the Special Master, when allowed by him, when filed with the Clerk of the District Court, upon his application for leave to file his intervening petition, was, under controlling decisions, not entitled to a preference or priority in payment.

C.

In holding that petitioner's judgment is but a general claim, the courts below have not failed to give effect to the statutes of Missouri, to the applicable decision of the Supreme Court of Missouri, nor to the weight of authority.

ARGUMENT.

I.

A.

The Matters at Issue in the Within Cause Were Correctly Decided by the Circuit Court of Appeals for the Eighth Circuit When It Affirmed the Order of the District Court Denying, on the Ground of Estoppel, the Petition of Peter J. Carpenter, Petitioner Herein, for Leave to File His Petition for Order Terminating Receivership of Respondent Wabash Railway Company, and Dissolving Temporary Restraining Order and Injunction.

B.

Petitioner Was Not Entitled to File His Intervening Petition Because It Did Not Comply With Equity Rule 37 Governing Intervening Petitions, and Was Not in Compliance With Rule 24 of the New Federal Rules.

A. The petition for writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit filed herein by Peter J. Carpenter, petitioner, we respectfully submit is without merit and should be denied. The petitioner had ample opportunity to file his claim for preference and priority in payment of his claim against the Wabash Railway Company, but he failed and neglected to do so when he filed his statement of claim on or after the 9th day of June, 1932 (R. 107), and neglected to amend such claim so as to show that he claimed such preference even after the answer of the petitioners filed on August 31, 1932, expressly and specifically pleaded that he was not entitled to any preference or priority in payment (R. 109). Nor did the petitioner claim any preference or priority in payment of his claim in the hearing before the Special

Master on the 26th day of August, 1935 (R. 102-104). Nor was any claim for preference or priority made by the petitioner on the sixth day of January, 1936, when the Special Master announced that "said claim is not entitled to any preference or priority over other general unsecured claims" (R. 104-105). The record shows that the Special Master filed such findings in the office of the Clerk of the District Court on March 7, 1936 (R. 105). Nothing, however, was done by the petitioner to correct the alleged error of the Special Master in determining that such claim of the petitioner was not entitled to preference or priority in payment, until January 26, 1938 (R. 44), when he filed his notice "for leave to file petition for order terminating the receivership of Wabash Railway Company, etc." It thus appears that petitioner took no action which would advise the Special Master or the District Court that he was claiming a preference or priority in payment of his claim between the early part of June, 1932, and the latter part of January, 1938, a period of more than five years and six months. It further appears that petitioner did not attempt to correct the alleged error of the Special Master from March 7, 1936, to January 26, 1938, or for a period of more than one year and ten months. Such inaction, failure and neglect on the part of petitioner to timely and seasonably press his claim for a preference, we respectfully submit, estops and has long estopped the petitioner from alleging and claiming or maintaining that the determination that his claim was not entitled to preference or priority in payment is error. To permit the petitioner to set aside the finding of the Special Master would manifestly be unjust to other claimants who seasonably and timely filed and proved their claims, and would undeniably upset the regular and orderly processes of trial courts and would nullify the provisions of Equity Rule No. 66, which was in effect when petitioner's claim was filed and was in effect when

petitioner's claim was determined, and would invalidate Rule No. 24 of the Rules of Civil Procedure for the District Courts of the United States promulgated by this Honorable Court and made effective from and after September 16, 1938.

Equity Rule No. 66 provides that "the parties shall have twenty days from the time of the filing of the report to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed."

And Rule No. 24 of the New Federal Rules referring to intervention of right under subsection (a), and permissive intervention under subsection (b), conditions such right "upon timely application."

Can it, therefore, be reasonably said that petitioner, who delayed in asserting his claim for a period of five and one-half years from the date of the filing of his claim and for a period of one year and ten months after the allowance of his claim, has made "timely application" for a rehearing or redetermination which he now asks this Court to grant him?

B. Equity Rule No. 37 provides as follows:

> "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervening petition which petitioner proposed to file was in disregard of this rule in that it was not "in subordination to nor in recognition of the propriety of the main proceeding," but, on the contrary, sought the discharge of the Receivers and the dismissal of the main proceeding in order that petitioner might be enabled to pro-

ceed against the Wabash Railway Company under Section 77 of the Bankruptcy Act.

There can be no question that Rule 37 was in full force and effect when plaintiff sought to file his intervening petition on January 26, 1938, and continued in effect when the District Court denied his application to file his petition on August 31, 1938 (R. 78), because the new Federal Rules, under the express provisions of Rule 86 of said Rules, were not effective until September 16, 1938. But, irrespective of the application of the new Federal Rules, the Court's action in denying to petitioner leave to file his intervening petition was correctly decided because Rule 24 of said Rules provides that such application must be "timely."

II.

A.

The Decision of the Circuit Court of Appeals, in Holding the Petitioner Estopped From Not Asserting a Claim for Preference, Is Not in Conflict With the Decisions of Any Other Circuit, Nor Is the Court's Decision Denying to Petitioner Leave to File His Intervening Petition and the Relief Prayed Therein in Conflict With Any Decisions of This Court.

B.

There Is No Conflict Between Bowen v. Hockley, 71 F. (2d) 781 (C. C. A. 4, 1934), and Carpenter v. Wabash Railway Company, 103 F. (2d) 996 (C. C. A. 8, 1939).

A. The petitioner, in the second point relied on for the allowance of the writ (page 10 of Petitioner's Petition for Writ of Certiorari and Brief in Support Thereof), and in point III of his argument (pages 26 and 27 of Petitioner's Petition for Writ of Certiorari and Brief in Support

Thereof) contends that the decision of the Circuit Court of Appeals on the question of estoppel is in conflict with the decisions cited by him. We shall discuss each of these decisions in the order in which they are cited.

The Court, in Holman v. Cross, 75 F. (2d) 909, merely held that the District Court was not bound by the conclusion of law of the Master appointed by him. The cited case is not on its facts in point with the case at bar. Even so, we find no fault with the conclusion of law therein expressed, but fail to see how it in any way aids petitioner.

In the case of Lone Star Gas Co. v. City of Fort Worth, 93 F. (2d) 584, the Circuit Court of Appeals held that the District Judge is not bound by the Master's report. It is not to be presumed in the case at bar that, because the District Court arrived at the same conclusion as the Master, he was overly bound by the Master's report. Neither the District Court nor the Circuit Court of Appeals, in their decisions, indicated that they felt themselves bound by the Master's report; but, on the contrary, held, after examining the record, that the petitioner was estopped to assert a claim for preference in his petition for leave to file an intervening petition.

The petitioner also cites the case of Childs v. County Trust Company of New York, 70 F. (2d) 1012. In that case the Circuit Court of Appeals affirmed without opinion a decision of the District Court, which, among other things, held that the District Court must review the facts where the reference is to hear and report on claims. This is exactly what the Court did in the case at bar at the time it refused the petitioner leave to file his intervening petition.

The petitioner also contends that the decision in the case at bar is in conflict with the decision in the case of Employers' Liability Assurance Corporation v. Astoria Mahogany Co., 6 Fed. (2d) 945. That case merely held

that delay in filing a claim may, under certain circumstances, be excusable, but in the case at bar there is more than just a question of delay in filing a claim. In the case at bar the petitioner was permitted to file his claim, and it was allowed. As we have pointed out in I, supra, however, petitioner did not ask for a preference when he filed his claim, did not contest Receiver's answer alleging that petitioner was not entitled to any preference, made no claim for a preference at the hearing before the Special Master, did not except to the report of the Special Master, which accorded petitioner no priority, and did not except to the filing of said report. It is apparent that the decision of the Circuit Court of Appeals holding that under these facts the petitioner was estopped is not in conflict with the decision of the Fifth Circuit, which holds that the District Court must, where it does not appear that prejudice would result to diligent creditors, allow a creditor to file his claim even though the time for filing has passed.

The petitioner also cites the case of People v. Hopkins, 18 F. (2d) 731. In that case the application for the allowance of the claim of the sovereign state for unpaid taxes was made in eight days after a default order had been entered that no taxes were due. The Court pointed out that the State Tax Commission did not receive notice of the default order until two days before it filed its application for the payment of taxes. Upon those facts the Court held that the state was not barred. These facts are, of course, wholly dissimilar to the facts in the case at bar, because in this case the petitioner had notice of all proceedings from the very inception of his claim.

The petitioner in his petition for writ of certiorari has stated under his third reason relied on for the allowance of the writ (p. 11, Petition for Writ of Certiorari and Brief in Support Thereof) that the decision of the Circuit

Court of Appeals is in conflict with the cases of Metropolitan Railway Receivership, 208 U. S. 90, 52 L. Ed. 403, 28 Sup. Ct. 210, and Milwaukee and Minnesota Railroad Company v. Soutter, 69 U. S. 510, 17 L. Ed. 900. Neither of these cases, we respectfully submit, is at all similar on its facts to the case at bar and there is nothing in either of them which is in conflict with the decision of the Circuit Court of Appeals. The petitioner apparently reached the same conclusion because he does not attempt to argue the point in his brief, nor to point out to the Court wherein the conflict lies.

B. There is no real conflict between the Fourth and Eighth Circuit Courts of Appeals as to whether an employee's judgment for personal injuries is a general or preferred claim. The only case in the Fourth Circuit Court of Appeals in which the question was squarely presented followed the rule laid down in the Eighth Circuit. Hampton v. Norfolk & W. R. Co., 127 F. 662 (C. C. A. 4, 1904), a case which to date has not been overruled and whose authority cannot be said to have been shaken by the Hockley case. The important—in fact, the controlling—difference between the Hockley case and the Carpenter and Hampton cases is that the latter cases did not involve statutes, while the Hockley case was based upon a statute. Other distinctions could easily be made between the Hockley case and all the other cases on the subject, but in the interest of brevity we will content ourselves with referring this Court to the views of the Eighth Circuit Court of Appeals and the Second Circuit Court of Appeals on this subject.

Judge Learned Hand, speaking for an undivided Court on that particular question (In re New York, N. H. & H. R. Co., 92 F. [2d] 428 [C. C. A. 2, 1937]), said (l. c. 430):

"In Bowen v. Hockley (C. C. A.), 71 F. (2d) 781,

94 A. L. R. 856, the Fourth Circuit did indeed establish an exception in the case of compensation awards to employees, though even then only to the extent of charging upon income such installments as fell due during the receivership. The reasoning on which this rested was that, as the employee's labor was necessary to the operation of the road, his compensation, like his wages, was for the benefit of the lienor. It may be doubted whether compensation stands like wages in the sense that doubts as to its priority in insolvency would even remotely affect the willingness of the men to continue to work; but with that we need not concern ourselves."

Circuit Judge Faris, while delivering the opinion of the Court in Pitcairn v. Fisher, 78 F. (2d) 649 (C. C. A. 8, 1935), stated, l. c. 653:

"The case of Bowen v. Hockley (C. C. A.), 71 F. (2d) 781, 94 A. L. R. 856, is urged and greatly relied on by appellee. This was a case wherein more than a year prior to receivership the beneficiary had been awarded compensation for the death of her husband by the State Industrial Accident Commission of the State of Maryland. The award was made under the provisions of the Maryland Workmen's Compensation Act. It was for the sum of $18.00 per week, for a total of some 277 weeks. Under the award, payments had been made weekly until the receiver was appointed. He refused to make further payments, and the beneficiary brought suit. The Court of Appeals of the Fourth Circuit held that such payments should be made pending the receivership. It was, however, pointed out in the opinion that there are three methods of securing payment of awards under the Maryland local law. First, insurance in the state accident fund; second, insurance by private corporate insurers; and, third, assumption of the risk by the employer, when seemingly amply solvent. In the Bowen Case, supra, a fourth method, seemingly deemed a compliance with

the third method, was used. That is, a bond to secure the payment of all such awards was given by the employer. This bond it appeared was not sufficient to cover all outstanding awards, and the receiver of the employer was held liable.

"No reference is made in the Bowen opinion to the Veatch Case, the Riley Case, both supra, or to any other case we cite above. * * * *Clearly, then, the Bowen Case rode off on a theory of insurance under the local statute, for the court designate the employer as a 'self-insurer' under the third alternative above referred to.*"

See, also, 90 A. L. R. 664-668.

The petitioner, however, may point to the cases referred to in 90 A. L. R. 668-669 as sustaining the petitioner in his contention that a conflict exists between the jurisdictions. A glance at those cases, however, will clearly show that the decisions contra the views we have expressed either arose in state courts or have arisen in a Federal Court, while applying a state statute. The decisions contrary to the views expressed in the Carpenter case involved state statutes, while the decision in accord with views expressed in the Carpenter case and other cases considered the same question, independently of any controlling statute. We further submit that the cases giving the injured employee a preference are unsound and are based on judicial legislation, a function better and more wisely left to the discretion of the legislative bodies of the several states in which such question arises or is likely to arise.

In addition thereto it is not inappropriate to state that it is beyond the scope of the authority of this Court to resolve conflicts in the decisions of the several state courts where questions of local law are involved. However, it may be argued that it is within the federal power to regulate railroads engaged in interstate com-

merce. That unquestionably is true, but at the time when petitioner was injured, and at the time when his judgment claim was allowed as an unsecured claim, Congress did not see fit to control and regulate the scope of equity receivership.

III.

A.

Section 77 of the Bankruptcy Act, as Amended, Had and Can Have No Application to Petitioner's Claim for Preference or Priority in Payment Because His Rights and the Rights of Other Creditors Were Fixed as of the Date When the Receivers Were Appointed.

B.

Petitioner's Claim, When Receivers Were Appointed, When Filed, When Heard by the Special Master, When Allowed by Him, When Filed With the Clerk of the District Court, Upon His Application for Leave to File His Intervening Petition, Was, Under Controlling Decisions, Not Entitled to a Preference or Priority in Payment.

C.

In Holding That Petitioner's Judgment Is but a General Claim, the Courts Below Have Not Failed to Give Effect to the Statutes of Missouri, to the Applicable Decision of the Supreme Court of Missouri, Nor to the Weight of Authority.

A. Section 77 of the Bankruptcy Act, as now amended, is not applicable to petitioner's claim for preference or priority in payment, because his rights were fixed either when he obtained his judgment in 1931 or in 1934 (R.

105), at a time long prior to the enactment of Section 77 of the Bankruptcy Act, as now amended.

It is thus held in In re K-T Sandwich Shoppe of Akron, 34 F. (2d) 962 (D. C., N. D., Ohio, E. D. 7-8-39), l. c. 963:

> "*It is a general rule that* a receiver acquires no greater rights in the property put into his possession by the appointing court than the debtor had, and that the Receiver takes and holds such property subject to such equities and liens as exist, and to which the property was subjected in the possession of the debtor, or the person out of whose hands it was taken, when the receiver was appointed; but, except as to such liens as existed at the time of his appointment, such receiver generally holds the property for the benefit of general creditors under direction of the court, and *no lien can be acquired after the receiver has taken possession of the res.* Horn v. Pere Marquette R. Co. (C. C.), 151 F. 626, 633; H. K. Porter Co. v. Boyd (C. C. A.), 171 F. 305, 312 et seq.; T. L. Smith Co. v. Orr (C. C. A.), 224 F. 71; Shooters Island Shipyard Co. v. Standard Shipbuilding Corporation (C. C. A.), 293 F. 706, 716; Cornelius v. C. C. Pictures, Inc. (D. C.), 296 F. 487."

To the same effect is Illinois Central R. Co. v. United States Fidelity & Guaranty Co., 87 F. (2d) 121 (C. C. A. 5, 1936). The petitioner in that case, as the petitioner in the case at bar, contended that Section 77 of the Bankruptcy Act, as amended, was applicable to an equity receivership. The Court, in rejecting this contention, said (l. c. 123):

> "The above statute applies expressly to proceedings in bankruptcy, and this is an equity receivership (Clough v. Superior Equipment Corporation, 18 Del. Ch. 202, 157 A. 306, 309), but, aside from these facts, the amendatory act relating to reorganization of railroads had not been passed when the receiver in this case was appointed. *Rights of petitioners were fixed as of the date the Receiver was appointed. In re U.*

S. Security Co., 321 Pa. 276, 184 A. 106; *In re K.T. Sandwich Shoppe of Akron* (D. C.), 34 F. (2d) 962, 963."

In view of the fact that it was unquestioned law that petitioner's judgment claim was not entitled to priority over other general unsecured claims at the time when Receivers were appointed, and at the time when petitioner's claim was presented, heard and allowed, Section 77 of the Bankruptcy Act, as now amended, cannot lawfully change the status of petitioner's claim from an unsecured claim to a claim entitled to preference or priority in payment. To do so would unfairly and prejudicially affect the rights of diligent creditors whose claims have long since been allowed and classified.

B. A careful examination of the cases leads us to believe that the annotator in 90 A. L. R. 664-665 is more than justified in stating that:

> "*The Federal Courts, apparently without exception*, and some state courts, *hold that claims* for damages to person or property arising from the operation of a railroad before the appointment of a receiver are not entitled to priority over a pre-existing mortgage."

As a matter of fact, we have diligently and carefully searched in vain for a case decided by any District Court or any Circuit Court of Appeals that holds that an employee injured while in the performance of the duties of his employment was entitled to preference or priority in payment of his claim or judgment. The history of the decisions on this subject is briefly and concisely stated by Judge Learned Hand in the case of In re New York, N. H. & H. R. Co., 92 F. (2d) 428 (C. C. A. 2, 1937), l. c. 430:

> "In Burnham v. Bowen, 111 U. S. 776, 783, 4 S. Ct. 675, 679, 28 L. Ed. 596, Chief Justice Waite concluded

by saying that only those expenses should have priority which were 'for the benefit of mortgage creditors,' language which has been accepted several times since. St. Louis etc. Ry. Co. v. Cleveland etc. Ry. Co., 125 U. S. 658, 673, 674, 8 S. Ct. 1011, 31 L. Ed. 832; Virginia & Alabama Coal Co. v. Central R. R. & Banking Co., 170 U. S. 355, 367, 18 S. Ct. 657, 42 L. Ed. 1068; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 285, 286, 20 S. Ct. 347, 44 L. Ed. 458; Gregg v. Metropolitan Trust Co., 197 U. S. 183, 187, 25 S. Ct. 415, 49 L. Ed. 717. It was upon the basis of this gloss upon the original text that, when the case arose of a claim for injuries, the Eighth Circuit denied priority. (St. Louis Trust Co. v. Riley [C. C. A.], 70 F. 32), a decision which has been followed in three other circuits and was unquestionably the law when section 77 was passed. Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co. (C. C. A. 9), 79 F. 227; Hampton v. Norfolk & W. R. R. Co. (C. C. A. 4), 127 F. 662; Pennsylvania Steel Co. v. N. Y. City Ry. Co. (C. C. A. 2), 216 F. 458."

An investigation of the cases subsequent to the above-cited cases discloses no federal court decision involving receivership cases where an injured employee's claim was adjudged to be entitled to preference or priority in payment. In view of the above, it is too clear for any argument that the Circuit Court of Appeals correctly decided the questions which the petitioner herein now asks this Court to rehear and redetermine anew.

C. Point II, pages 24-26 of petitioner's brief, maintains that the Court's judgment was in disregard of section 1104, now superseded by section 1103, as amended, and section 1105 of the Revised Statutes of Missouri 1929, and in conflict with a controlling Missouri decision and the weight of authority.

Whether the petitioner had a judgment lien against

Missouri real estate at the time he filed his claim in 1932, which might have entitled him to priority over simple non-judgment claimants, is not material to the decision of this case, because the petitioner's real contention is that *his claim is entitled to priority over the liens of the mortgages and to payment as such.* If that were not petitioner's contention there would be no need for him so strenuously to seek to invoke Subsection (n) of Section 77 of the Bankruptcy Act (Point I, pages 17-20, 22-24, of petitioner's brief), a law wholly inapplicable to receivership proceedings at the time petitioner's appeal was determined by the Circuit Court of Appeals (103 F. [2d] 996, l. c. 1000; R. 120).

But the District Court's holding (and the Circuit Court's approval of it), when viewed in its true light and under the circumstances obtaining in the instant cause, was correct.

It is well settled that:

> "The priority of mortgage and judgment liens is determined at common law by the date of their acquisition, the first in time being the first in right. A mortgage recorded prior to an entry of judgment which is a lien upon the property takes precedence of the judgment lien, and a foreclosure of the mortgage, or the sale of the property under a power in the mortgage, defeats the judgment lien; * * *." Jones on Mortgages, Eighth Edition, pages 772-773, § 577.

To the same effect is 34 C. J. 591, §903, and 34 C. J. 605, §905, and note 4, p. 606.

> 34 C. J. 591.
>
> [§903.]. I. *Estate or Interest Affected by Lien; 1. In General.* "The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the land, and only to such interest; the lien cannot be made

effectual to bind or to convey any greater or other estate than the debtor himself, in the exercise of his rights, could voluntarily have transferred or alienated.[55]"

[55] Mo. Union Bank v. Manard, 51 Mo. 548.

34 C. J. 605.

[§925.]. 2. *Between Judgment and Conveyances and Other Liens*—a. *Prior Conveyances Generally.* "Since the lien of a judgment attached only to the actual interest of the debtor in the land, the general rule, in the absence of a statute to the contrary, and subject to registration statutes prescribing the effect of unrecorded conveyances and mortgages upon the rights of purchasers and creditors, is that *a judgment lien is subordinate to prior conveyances and encumbrances and all existing liens and equities in favor of third persons.*[4]"

[4] Mo. Bryan v. McCaskill, 284 Mo. 583, 225 S. W. 682; Jones v. Levering, 116 Mo. A. 377, 91 S. W. 980.

Conclusion.

In conclusion we respectfully submit that the petitioner is not entitled to the issuance of a writ of certiorari in this case because the decision of the Circuit Court of Appeals, in affirming the District Court's denial of leave to the petitioner to file and be heard upon his intervening petition, was correct on the following grounds:

1. That the petitioner's claim was not a preferred claim on the theory that it was an operating expense of the Railroad Company.

2. That Subsection (n) of Section 77 of the Bankruptcy Act, as amended, had no application in equity receivership proceedings.

3. That the proposed petition of intervention was in dis-

regard of provisions of Equity Rule 37 and Rule 24 of the Federal Rules of Civil Procedure.

4. That the petitioner was estopped to assert his claim by way of intervening five and one-half years after the filing of his claim.

5. That the petitioner has wholly failed to demonstrate that the decision in the instant case is in conflict with the decisions in any other circuit or in disregard of the holdings of this Court.

We respectfully further submit that the instant case is not of such great general importance and public interest as to justify the issuance of the writ.

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